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**Re: National Priorities List, Proposed Rule No. 61**
**35th Avenue, Docket ID No. EPA-HQ-SFUND-2014-0623**
**Comments of the Alabama Attorney General's Office**

On behalf of the State of Alabama, the Office of the Attorney General for the State of Alabama submits the following comments in response to the U.S. Environmental Protection Agency's ("EPA") decision to propose the "35th Avenue" site in Birmingham, Alabama, for inclusion on the National Priorities List ("NPL"). As the comments set forth, the State does not support the listing of the 35th Avenue site on the NPL for a number of reasons, including:

- The State does not have adequate funds to provide EPA with the assurances required under 42 U.S.C. § 7604(c) to access Superfund monies to fund remedial activities.
- EPA Region 4 failed to adequately involve the State in the NPL listing decision making process, as required by EPA's own guidance.
- EPA's use of an expansive air deposition theory to establish "potentially responsible party" ("PRP") liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") ignores the "federally permitted release" exemption for air emissions from industrial point sources covered by certain Clean Air Act ("CAA") provisions.
- EPA's air deposition theory cannot create arranger liability because the statutorily-defined term "disposal" does not cover air emissions.

- EPA's air deposition theory cannot create arranger liability because it does not require that the emitter arrange for disposal with another party.

- EPA improperly imports priorities from its environmental justice initiative into the NPL listing process without statutory authority.

- EPA fails to apply and/or improperly applies important technical data and studies concerning the 35th Avenue Site, as set forth in Alabama Department of Environmental Management ("ADEM") comments on the proposed listing (incorporated herein).

- EPA has failed to undertake its dispute-resolution process, as required by EPA's own guidance.[1]

For all of these reasons, as developed more thoroughly below, the State of Alabama requests that EPA withdraw its proposed listing and work with the State to find a more suitable means for addressing any environmental contamination issues at the 35th Avenue site.

## COMMENTS

## I. ALABAMA WAS NOT ADEQUATELY INVOLVED IN EPA'S LISTING PROCESS

EPA's failure to adequately involve Alabama in its decision making process regarding the 35th Avenue site rendered its decision arbitrary, both as a practical matter and in terms of its own policies. The following analysis sets forth why a State's involvement in the NPL listing process is vital, the EPA policy ensuring state involvement, how Alabama was inadequately involved in the 35th Avenue site listing process according to EPA's own policies, and how EPA has failed to conduct a proper review of the State's objections to the listing through its dispute resolution process.

### A. State Involvement in the NPL Listing Process is Crucial

Inclusion of a site on the NPL is "often the best assurance for a comprehensive site response" and "provides strong leverage for State and PRP response activities."[2] The decision to include a site on the NPL is a crucial administrative step in the response to a hazardous waste spill, not only because a site's rank on the NPL serves as "a basis to guide [EPA's] allocation of Fund resources among releases,"[3] but, more importantly, only sites included on the NPL are "eligible for Fund-financed remedial[4] actions." *Id.* §§ 300.425(b)(1),(3) (emphasis added).

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[1] The comments of ADEM on all technical matters underlying the proposed listing are hereby incorporated by reference.

[2] Memo. from Elliot P. Laws, Asst. Admin. EPA OSWER, to EPA Reg. Admins., at 1 (Nov 14, 1996) ("Laws Memorandum").

[3] 40 C.F.R. § 300.425.

[4] 42 U.S.C. § 9601 (24) ("The terms 'remedy' or 'remedial action' means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of

Hazardous Release sites may be listed on the NPL for three reasons: (1) if they score sufficiently high on the HRS, (2) if they are the State's designated top priority release, or (3) if they meet three criteria applicable to particularly dangerous releases. 40 C.F.R. § 300.425(c). Here, the 35th Avenue site was listed due to its initial HRS site score of 50.00.[5]

Even where an HRS score is sufficiently high to warrant listing, however, EPA policy requires regional offices to consult with the appropriate officials in the impacted State or States before recommending listing. The express purpose of EPA's "working closely with the States" is to "ensure that sites are evaluated quickly and that response actions, if warranted, are taken as quickly as possible."[6] Perhaps more importantly, as EPA's own regulations set forth, "[o]nly those releases included on the NPL shall be considered eligible for Fund-financed remedial action." 40 C.F.R. § 300.425(b)(1). Thus, even if a site is listed on the NPL, "[a] Fund-financed remedial action undertaken pursuant to CERCLA section 104(a) cannot proceed unless a state provides its applicable required assurances." *Id.* § 300.510(a) (emphasis added). Such assurances include that "the State will pay or assure payment of . . . 10 per centum of the costs of the remedial action, including all future maintenance . . . ." 42 U.S.C. §9604(c)(3). Without a State's assurances, EPA is forced to treat the site as if it were not listed, seeking remediation funds through judicial or administrative orders, cost recovery actions, and voluntary settlement agreements. 40 C.F.R. § 300.425(b)(1).

Consultation with the State early in the NPL listing process is crucial because it allows the parties to determine whether the State can or will provide assurances and, therefore, whether the listing will ultimately result in Superfund-financed remedial action. If no assurances are guaranteed, the listing's value is significantly diminished. But, as discussed in more detail below, that is precisely what is occurring here. The State of Alabama does not concur with Region 4's recommendation regarding the 35th Avenue site. Moreover, the State does not have sufficient funds to finance remedial actions at the site. Consequently, the State cannot provide EPA with the necessary assurances it needs to access the Superfund. EPA's failure to remedy these issues through its state coordination and conflict resolution processes makes the present proposal arbitrary and capricious.

### B. EPA State Coordination Policy

When Congress drafted CERCLA, it expressly set forth its intention that States would be deeply involved in the cleanup process. To that end, the statute states that EPA must "promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State." 42. U.S.C. § 9621(f). Such regulations must include, "at a minimum," each of the following:

- State involvement in decisions whether to perform a preliminary assessment and site inspection;

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hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.").

[5] EPA Region 4, HRS Documentation Record for 35th Avenue Site (EPA ID No. ALN000410750), Docket ID. No. EPA-HQ-SFUND-2014-0623-0004, at 1(Sept. 2014)

[6] Memo. from Timothy Fields, Ass't Admin OSWER, to EPA Reg. Admins, 2 (July 25, 1997) ("Fields Memorandum").

- Allocation of responsibility for hazard ranking system scoring;
- State concurrence in deleting sites from the NPL;
- State participation in the long-term planning process for all remedial sites within the State;
- A reasonable opportunity for States to review and comment on . . . (i) the remedial investigation and feasibility study and all data and technical documents leading to its issuance . . . (ii) the planned remedial action identified in the remedial investigation and feasibility study . . . (iii) the engineering design following selection of the final remedial action . . . (iv) other technical data and reports relating to implementation of the remedy . . . (v) any proposed finding or decision by EPA to exercise the authority of subsection (d)(4) of this section;
- Notice to the State of negotiations with PRPs regarding the scope of any response action at a facility in the State and an opportunity to participate in such negotiations and . . . be a party to any settlement;
- Notice to the State and an opportunity to comment on the EPA's proposed plan for remedial action as well as on alternative plans under consideration. EPA must respond to those comments in writing and include its response with its proposed decision;
- Prompt notice and explanation of each proposed action to the State in which the facility is located.

*Id.*

In 1996, Congress enacted legislation[7] requiring EPA to obtain a written request from a State's governor before placing a site on the NPL. While that mandate expired after one year, EPA interpreted this temporary statutory requirement as an expression of Congress's desire for EPA to enhance its coordination with states in NPL listing decisions. In response, EPA drafted the Laws Memorandum,[8] "outlin[ing] a process to continue to include State input in NPL listing decisions" in an "effort to maintain close coordination with the States." *Id.* The precise process for resolving disputes "in cases where a Regional Office . . . recommends proposing or placing a site on the [NPL], but the State . . . opposes listing the site" was set forth a year later in the Fields Memorandum.

Among other things, EPA's state coordination and dispute resolution processes require the EPA Regional Administrator to obtain "as early in the site assessment process as practical" the State's position regarding sites that EPA is "considering for NPL listing." Law Memo. at 2. The inquiry must be directed in writing to the Governor of the State, copying the state's environmental commissioner, and must request a written response setting forth the State's position on the potential NPL listing. *Id.* The correspondence between the State and the Region is forwarded to the Director of EPA's Office of Emergency and Remedial Response ("OERR")

[7] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law 104-134 (Apr. 26, 1996).

[8] Laws Memo. at 1.

for continued oversight purposes. *Id.* If the State "does not agree that EPA should pursue NPL listing, but the Region believes it has sufficient reasons to proceed," the Fields Memorandum instructs the Region to "work closely with the State" to try to resolve any issues that arise before involving EPA Headquarters, taking into account "past, ongoing and planned response actions by the State." Fields Memo. at 2. If the Region determines that no resolution to the dispute is possible, it must inform the Director of the State, Tribal, and Site Identification Center ("ST/SI") of OERR and/or the appropriate ST/SI Regional Coordinator. *Id.* That person must then brief the Office of Solid Waste and Emergency Response ("OSWER") *Id.* The State is then given a second chance to "present its position in writing." *Id.* Only after the State has had that opportunity will OSWER decide "whether to pursue NPL listing." *Id.* (emphasis added).

### C. Alabama's Inadequate Involvement in the 35th Avenue Site NPL Listing Process Makes the Proposal Arbitrary and Capricious

Region 4 contacted ADEM on April 2, 2014, regarding the State's position on potentially listing the 35th Avenue site on the NPL.[9] On June 11, 2014, ADEM responded, advising Region 4 that it could not concur in the proposed listing because the State would not provide any funding to cover the State's share of cleanup costs.[10] As the letter stated, "ADEM's support for such a listing would be contingent on having funding available to cover the State's share of the cleanup costs. Currently, no such funding source exists." LeFleur Letter at 1.

To ensure that ADEM's position was unmistakably clear, ADEM Director LeFleur directed a follow-up e-mail to EPA Director McCarty, Region 4 Administrator McTeer-Toney, and EPA Chief of Staff Keyes-Fleming, stating: "In my June 11, 2014 response directed to Regional Administrator McTeer-Toney, EPA was informed the State **DID NOT CONCUR** in the proposed listing. The State **DOES NOT CONCUR** in the proposed listing for numerous reasons."[11] Despite the significant, express qualifications in the original letter and the crystal clear language of the follow-up, EPA did not initiate formal negotiations with the State to resolve the State's issues with the listing.

The State continues to disagree with EPA's decision to add the 35th Avenue site to the NPL, and cannot provide any assurances of funding for the cleanup. Nonetheless, EPA has failed to follow its own policy and has afforded Alabama no further opportunity to present its position in writing as the Field Memorandum requires. Instead, after being informed that the State of Alabama did not concur with the proposed NPL listing and that no State funds would be allocated to assist in any clean-up effort at the 35th Avenue site, EPA moved forward with its proposed NPL listing without any further involvement from the State. Moreover, EPA misrepresented the LeFleur Letter as a "lette[r] of support" in the proposed listing. 79 Fed. Reg.

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[9] Letter from Franklin E. Hill, Dir. of Superfund Division, EPA Reg. 4, to Phillip Davis, Dir. Land Mgmt. Div., ADEM (Apr. 2, 2014).

[10] Letter from Lance R. LeFleur, Dir. of ADEM, to Heather McTeer-Toney, Reg. Admin. EPA Reg. 4, EPA Dock. No. EPA-HQ-SFUND-2014-0623-0003 (June 11, 2014) ("June ADEM Letter") (emphasis added).

[11] E-mail from Lance R. LeFleur, Dir. of ADEM, to Gina McCarty, Admin. of EPA, Heather McTeer-Toney, Reg. Admin., EPA Reg. 4,Reg. 4, and Gwendolyn Keyes-Fleming, EPA Chief of Staff (Sept. 16, 2014).

56,538, 56,544 (Sept. 22, 2014). Further repudiation of this characterization of the letter was provided in a letter from this Office to Ms. McTeer-Toney of Region 4.[12]

Such a blatant disregard of EPA's own policies and procedures, as set forth in the Laws and Fields memoranda, is textbook arbitrary and capricious decision making. *See, e.g.*, *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned . . . ."). Because the decision to propose the listing has not been elevated for review and because the State was not given the "opportunity to present its position in writing," as the Fields memo mandates, EPA's proposed rule listing the 35th Avenue Superfund Site as an addition to the General Superfund section of the NPL is premature.

### 1. Alabama's right to submit comments under the APA does not satisfy EPA's State Coordination Policy

While EPA apparently believes that the current notice-and-comment rulemaking is an adequate substitute for its coordination policy, this view is untenable. EPA's handling of the 35th Avenue site listing process fails to meet the standards set forth in the Laws and Fields memoranda for at least three reasons. First, EPA cannot conflate the procedural rights guaranteed to Alabama through the Administrative Procedure Act ("APA") with those guaranteed by the Laws and Fields memoranda. Both the 1996 legislation and the EPA guidance memoranda were drafted in a context where long-established administrative rulemaking procedures required EPA to publish its proposal and solicit public comments before including a site on the NPL. In other words, the APA already guaranteed the State an opportunity to voice its concerns over the potential NPL listing—or any other EPA action—before EPA can act. It is unreasonable to assert that EPA drafted the Laws and Fields memoranda merely to instruct its Regional Offices to carry out their most basic responsibility under the APA: notice-and-comment rulemaking. Such an interpretation renders its state coordination guidance completely superfluous. On the contrary, the only reasonable interpretation of the Laws and Fields memoranda is that they impose NPL-specific obligations above and beyond the obligations imposed by the APA.

Second, both memoranda make clear that implementation of their state coordination and dispute resolution processes are to take place during the consideration/decision-making/recommendation phase of an NPL listing process, not after a site has been proposed for listing. *See, e.g.*, Laws Memo. at 2 ("In an effort to maintain close coordination with the States in the NPL listing decision process, the Regions should determine the position of the State on sites that EPA is considering for NPL listing."); *id.* at 2 ("OERR will have a process to resolve issues for sites where the State does not agree that EPA should continue to investigate the site for possible inclusion on the NPL, but where the Region has compelling reasons to proceed with the evaluation."); Fields Memo. at 1 ("The purpose of this memorandum is to describe the process that will be employed in cases where a Regional Office . . . recommends proposing or placing a site on [the NPL] . . ."") (all emphasis added). This is further demonstrated by the Fields Memorandum's instruction for Regions to "try to resolve the issue before raising it to EPA

[12] Letter from Luther Strange, Ala. Att. Gen., to Heather McTeer-Toney, EPA Reg. 4 Admin., EPA Dock. No. EPA-HQ-SFUND-2014-0623-0003 (Oct. 21, 2014).

headquarters." Fields Memo. at 2 (emphasis added). EPA's proposing a site for listing over a State's objections before the dispute resolution process has run its course is completely at odds with EPA's own guidance memoranda. But that is exactly what EPA has done in this instance.

Finally, an early federal-state consultation process is crucial because of the underlying purposes of listing a site on the NPL. *See* Laws Memo. at 2 ("The Region should make this inquiry as early in the site assessment process as practical, ideally before initiating a Hazard Ranking System (HRS) package for the site." (emphasis added)). As EPA notes, inclusion on the NPL is important because it "is often the best assurance for a comprehensive site response," providing "strong leverage for State and PRP response activities." *Id.* If an NPL listing will not ultimately result in Superfund-financed remedial action, however, its value is significantly diminished in these regards. But that is precisely what is likely to occur when a State does not concur with a Region's recommendation. As both CERCLA and EPA's regulations make clear, "[a] Fund-financed remedial action undertaken pursuant to CERCLA section 104(a) cannot proceed unless a state provides its applicable required assurances," including assurances to undertake "all future maintenance of the removal and remedial actions provided for the expected life of such actions" and to "pay or assure payment of . . . 10 per centum of the costs of the remedial action, including all future maintenance." 40 C.F.R. § 300.510(a); 42 U.S.C. §9604(c)(3). Where a State does not concur with a listing, it is very unlikely to provide EPA with the necessary assurances. Similarly, where a State cannot provide those assurances, it is very unlikely to concur in a listing. If such issues are only identified and addressed after EPA has proposed an NPL listing, the state coordination process serves little purpose for either EPA or the State.

Thus, EPA's decision to propose the 35th Avenue site for inclusion on the NPL without first consulting with Alabama according to its state coordination and dispute resolution policy was arbitrary and capricious.

### 2. There is no sound basis for listing the site without the State's concurrence

EPA's decision to move forward with its proposed NPL listing is perplexing, given the State's clear statement that it will not allocate **any** funds to assist in any clean-up effort at the 35th Avenue Superfund Site. As discussed above, the very purpose of listing a site on the NPL is to make the site eligible for superfund monies. But the State of Alabama has been unmistakably clear that no State money will be expended to assist in any clean-up effort at the 35th Avenue Superfund Site. It is unclear why EPA would propose the site for listing at great expense to all concerned parties—and very likely diminishing all property values in the affected neighborhoods—when listing the site will be futile and have no practical effect. Without a clearer explanation for this decision, EPA's proposal remains arbitrary and capricious.

## II. SUBSTANTIVE LEGAL ISSUES WITH THE NPL LISTING

While the Alabama Attorney General's Office and U.S. EPA have similar interests in ensuring that environmental laws and regulations are enforced in accordance with applicable law in order to ensure a clean and healthy environment, this Office cannot condone EPA's usurping of Alabama's state sovereignty by assuming legal authority that it does not have. It is an

important principal of federalism that each state retains the authority to legislate and regulate persons and property within its jurisdiction unless and until Congress explicitly abrogates some portion of state authority through a valid exercise of federal power. Federal administrative agencies cannot and should not act without such power, and each State has a clear and substantial interest in ensuring that federal agencies, like EPA, do not exceed their authority when regulating the State's citizens, businesses, and property. In proposing the 35th Avenue Site for inclusion on the NPL, EPA has overstepped its authority under CERCLA—and, consequently, illegitimately usurped Alabama sovereignty—by asserting a novel air deposition theory and by allowing extra-statutory, "environmental justice" policy considerations to guide its NPL listing process.

### A. EPA is Overstepping its Statutory Authority Through its Novel Air Deposition Theory

EPA's admittedly novel and expansive air deposition theory exceeds the authority granted to the agency through CERCLA by creating PRP liability for parties acting alone, whose facilities are not connected to the release site, through air emissions subject to the CAA.[13] In short, this expansive conception of air deposition holds that the owner or operator of an industrial facility can be pursued as a CERCLA PRP by virtue of air emissions that are alleged to have settled to the ground at any hazardous waste release site, regardless of the site's location in relation to the emission source. Under this theory, EPA can impose PRP liability based on the purely hypothetical and generalized assumption that all air emissions invariably settle in significant concentrations across the area surrounding an emission facility, and that Congress intended to treat such pollution as if it were released directly to the ground.

CERCLA PRP liability has always been controversial because of its disregard for traditional standards of tort liability, allowing "potentially" liable parties who fall within certain categories to be held responsible for the cleanup of pollution without first proving that they caused it. EPA's new air deposition theory expands CERCLA PRP liability even further, effectively removing the geographic limitations of a site in regard to PRP status and allowing EPA to reach parties with no intentional association with the release site. Under this expansive air deposition theory, all that is needed are: (1) air emissions that could arguably reach a release site that (2) include at least one of the constituents of concern ("COC") identified at the release site. Since the list of COCs at a site will typically include common industrial contaminants such as arsenic or lead, the tenuous connection can almost always be established.

EPA is undoubtedly enthusiastic about a novel theory that potentially gives it access to thousands of additional PRPs (i.e., any facility that has emitted any pollutant that is currently covered by the CAA's National Emissions Standards for the Hazardous Air Pollutants ("NESHAPS") and that has had either unauthorized or pre-CAA emissions). Nevertheless, such an expansive and unrestrained interpretation of CERCLA PRP liability is unsupported by the text

[13] These Comments are not focused on a more modest air deposition theory covering, for example, dust and other particles blown from uncovered piles or other, similar ground-level, fugitive emission sources which are not covered by the CAA that settle in a clearly discernible manner onto the grounds of a facility and/or other contiguous properties.

of the statute, relevant federal case law, or the legislative history of the act, as demonstrated below.

### 1. Air Emissions are regulated by the Clean Air Act, not CERCLA

A glaring issue with EPA's air deposition theory is CERCLA's "federally permitted release" exemption. *See* 42 U.S.C. § 9607(j). EPA's "response authorities" under CERCLA are directly tied to "releases" of hazardous substances. *Id.* at § 9601(a)(1) ("Whenever . . . (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or . . . (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act . . ." (emphasis added)). However, the government cannot recover "response costs or damages" resulting from federally permitted activities covered under RCRA section 101(10)(H). *Id.* This "federally permitted release" exemption expressly includes air emissions covered by the CAA:

> The term "federally permitted release" means . . . any emission into the air subject to a permit or control regulation under section 111 ["Standards of Performance for New Stationary Sources")], section 112 ["Hazardous Air Pollutants"], title I part C ["Prevention of deterioration of Air Quality"], title I part D ["Plan requirements for Nonattainment Areas"], or State implementation plans submitted in accordance with section 110 of the Clean Air Act ["State implementation plans for national primary and secondary ambient air quality standards"] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections.

42. U.S.C. § 9601(10)(H). Thus, insofar as EPA applies its air deposition theory to reach facilities subject to the CAA, it has overstepped its authority.

It is very telling that the definition of a federally permitted release covers air emissions that are merely "subject to" a CAA permit or control regulation. *Id.* In direct contrast, CERCLA states that certain Clean Water Act ("CWA") discharges only fall under the federally permitted release exemption when they are "in compliance with" or "identified in" a CWA permit. *Id.* at § 9601(10)(A) and (C). Other CWA releases are only exempted when they are "in compliance with a legally enforceable final permit issued under the [CWA]." *Id.* at § 9601(10)(D). Similarly, Solid Waste Disposal Act (i.e., Resource, Conservation, and Recovery Act ("RCRA")) releases are only exempted when they are "released in compliance with a legally enforceable final permit limit issued pursuant to [RCRA]." *Id.* at 9601(10)(E). And the underground injection of fluids is only exempted when it is "authorized" under federal or state law. *Id.* at 9601(10)(G). The broad "subject to" language, however, applied to CAA emissions in CERCLA section 101(10)(H) stands in clear contrast to these other provisions and clarifies that EPA's jurisdiction over air emissions does not arise whenever a facility emits a pollutant in violation of or without a valid air permit. Such emissions are still *subject to* CAA regulation and permitting. *See e.g., Rodriguez v. United States*, 480 U.S. 522, 525, 107 S. Ct. 1391, 1393, 94 L. Ed. 2d 533 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion or exclusion."); *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 95, 115 S. Ct. 537, 541, 130 L. Ed. 2d 439 (1994).

While EPA could argue that CERCLA must be interpreted in a manner that does not create a "loophole," it is of no avail to distinguish air emissions emitted in compliance with a CAA permit from those emitted either in violation of a CAA permit or before the CAA was promulgated. While the CAA regulates air pollution, it does allow for air emissions under its permitting scheme. These emissions eventually settle to the ground in the exact same manner that unpermitted emissions would. Therefore, any claim that CERCLA's federally permitted release exemption provides a loophole for air emissions applies with equal force to both permitted and unpermitted emission. In fact, facilities which emit in compliance with federal CAA permitting standards are subject to emission limits, reporting and monitoring requirements, and various oversight and enforcement mechanisms. Facilities which emit air pollutants without required CAA permits are subject to suits by both the government and private citizens, and face civil and criminal penalties. *See, e.g.*, 42 U.S.C. § 7413 and 7604. Such facilities are also subject to traditional tort actions for trespass, nuisance, etc.[14] There is simply nothing unreasonable or illogical about the conclusion that Congress intended for the CAA to be the primary means for addressing issues associated with industrial air pollution, and that CERCLA was drafted around that statute.

Further, Congress's intent to exclude significant sources of air emission from CERCLA regulation is also evidenced in its treatment of mobile source emissions. The statute's definition of "release" comprehensively excludes all "emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine." *Id.* at § 9601(22)(B). This broad exemption demonstrates Congress's intention to place a substantial category of air emission sources beyond CERCLA's reach; the exclusion cannot be dismissed as a mere loophole. Moreover, this definition of "release" compliments the definition of "federally permitted release," which does not address mobile sources. Instead, the federally permitted release definition deals only with emission "subject to" certain, enumerated CAA provisions applicable to stationary sources. *See* 42 U.S.C. § 9601(10)(H) ("any emission into the air subject to a permit or control regulation under 111 . . . section 112 . . . title I part C . . . title I part D, or [non-disapproved] State implementation plans"). Combined, the two provisions exclude most air emissions, leaving only a residual category of emissions from mobile sources not covered by section 101(22) and stationary sources not covered by the specified CAA provisions. There is nothing to suggest that this is not what Congress intended.

With regard to facilities which emitted air pollutants before the CAA was instituted, the federally permitted release exemption should be applied to them as well. Ordinarily, a court should apply "the law in effect at the time it renders its decision." *Brady v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (2006). The exceptions to this presumption are when (1) "Congress has expressly prescribed the statute's proper reach" and (2) whether application of the rule would "produce an impermissible retroactive effect," i.e., "tak[e] away or impairs vested rights acquired under existing law, or creat[e] a new obligation, imposes a new duty, or attaches a new disability." *Landgraf v. US/ Film Prod.*, 511 U.S. 244, 280 (1994); INS v. St. Cyr, 533 U.S. 289, 291 (2001). Here, Congress did not proscribe CERCLA's retroactive reach and the

[14] *See, e.g., Bell v. Cheswick Generating Station*, 734 F. 3d 188, 198 (3rd Cir. 2013).

statute is consistently applied retroactively. Further, no party had vested rights in this regard. Thus, the federally permitted release should be applied to protect past emissions that would currently be "subject to" the CAA. Moreover, "CERCLA, it must be remembered, does not provide a complete remedial framework. The statute does not provide a general cause of action for all harm caused by toxic contaminants." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188, 189 L. Ed. 2d 62 reh'g denied, 135 S. Ct. 23 (2014). Because CERCLA imposes a non-traditional theory of liability on a broad class of persons for long past activities that may have been legal at the time, it is critical that courts do not expand the statute's reach without clear justification in the text or legislative history. While broadly construing CERCLA's express grants of authority to further the act's remedial purposes may be justified in some cases, ignoring the express language of the statute in an attempt to create "a complete remedial framework . . . for all harm caused by toxic contaminants" is not. *See Redwing Carriers v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545, 1558 (S.D. Ala. 1995) (refusing to "construe CERCLA liberally to achieve the overwhelmingly remedial goal of the CERCLA statutory scheme" because "it is one thing for courts to construe statutes liberally if that is the intent of the framers, but it is quite another — and quite improper — for courts to . . . read into statutes what is not there and misconstrue terms." (internal quotations omitted)).

Finally, the existence of apparent gaps in a remedial statutory scheme does not, by implication, grant EPA (or reviewing courts) unbridled, creative discretion to draft a more comprehensive scheme. *See United States ex. Rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199, 1214 (10th Cir. 2003).[15] What makes CERCLA's Superfund provisions unique is not that they impose liability on responsible parties, but that they impose liability on potentially responsible parties before causation is firmly established. It is a policy-based statute that shifts the burden of cleaning-up properties from federal taxpayers, to a smaller subset of parties with certain connections to the contaminated property. But, as noted above, it was never meant to be complete remedial framework; it does not capture all possible PRPs. Thus, the lines that Congress drew may sometimes appear arbitrary to those expecting a certain result, especially to those expecting a "general cause of action for all harm caused by toxic contaminants." EPA cannot justify an expansive reading of section 107(a)(3) on the ungrounded assertion that Congress would not have allowed some particular class of PRP to escape liability. *See, c.f., CTS Corp.*, 134 S. Ct. at 2188 (cautioning that "the level of generality at which [CERCLA's] purpose is framed affects the judgment whether a specific reading will further or hinder that purpose"). The statute should be left to speak for itself.

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[15] Citing *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir.1991)) ("Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. The natural meaning of words cannot be displaced by reference to difficulties in administration. . . . For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the [Act] ... is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it." (emphasis added) (internal citations omitted)).

Because air emissions subject to the CAA are "federally permitted releases," EPA cannot recover "response costs or damages" resulting from them. Therefore, its expansive air deposition theory is not authorized by CERCLA.

### 2. Emitting pollution from a facility into the ambient air is not "arranging" for "disposal" under CERCLA

There are four categories of PRPs under CERCLA: (1) current owners or operators, (2) past owners or operators, (3) arrangers, and (4) transporters. 42. U.S.C. § 9607(a). Since EPA's air deposition theory attempts to link parties who are clearly not transporters[16] to disposal sites that are not continuous with any facility under the parties' current or past ownership or operational control, EPA appears to be asserting "arranger" liability. *See Id.* § 9607(a)(3). An "arranger" is:

> Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. § 9607(a)(3) (emphasis added). "Arranger liability ensures that owners of hazardous substances may not free themselves from liability by selling or otherwise transferring a hazardous substance to another party for the purpose of disposal." *Heim v. Heim*, No. 5:10-CV-03816-EJD, 2014 WL 1340063, at *3 (N.D. Cal. Apr. 2, 2014). Thus, liability under section 107(a)(3) requires both an "intentional step to dispose of a hazardous substance" and an arrangement with some "other party or entity." *Celanese Corp. v. Martin K. Eby Const. Co.*, 620 F.3d 529, 533 (5th Cir. 2010) ("[A]n entity's knowledge that its action will result in a spill or leak is insufficient, by itself, to establish arranger liability; instead, the entity must 'take [ ] intentional steps' or 'plan[ ] for" the disposal of the hazardous substance.'" (citing *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 611, 129 S. Ct. 1870, 1879, 173 L. Ed. 2d 812 (2009)); *see also Vine St., LLC v. Keeling*, 460 F. Supp. 2d 728, 739 (E.D. Tex. 2006) (noting that one must establish "some legal mechanism" to link one party to the other in such a way that their acts "constitute [an] 'arrangement.'").

EPA's air deposition theory cannot establish arranger liability because it requires neither the intentional disposal of a hazardous waste nor a transaction with another party. As discussed directly below, neither are present in EPA's expansive air deposition theory for two primary reasons: First, air emissions are not captured under CERCLA's definition of the term "disposal" for purposes of CERCLA liability. 42. U.S.C. § 6903(3). Therefore, a party cannot intend to dispose of anything through air emissions. Second, CERCLA's arranger liability provision, section 107(a)(3), contemplates a second party with whom disposal is arranged. Under an expansive air deposition theory, air emissions do not reach a site via a second party.

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[16] 42. U.S.C. § 9607(a)(4) ("any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . .").

a) Air emissions do not constitute "disposal" under RCRA

EPA's air deposition theory exceeds the agency's authority because arranger liability only arises when a party "takes intentional steps to dispose of a hazardous substance." *Burlington N. & Santa Fe Ry. Co.* 556 U.S. at 600 (emphasis added); 42 U.S.C. § 9607(a)(3). Under CERCLA, a party cannot, as a matter of law, intend to dispose of a substance through air emissions. Air emissions are simply not covered under CERCLA's definition of "disposal," as that term is incorporated though RCRA. Under these statutes, disposal means:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42. U.S.C. § 6903(3) (emphasis added). The definition is divided into two parts creating two independent requirements. The first part sets forth a list of acts that can constitute disposal; the second part requires that the act results in a solid or hazardous waste entering the environment, air, or water. *See id.* at 1024 ("The text of § 6903(3) is also very specific: it limits the definition of 'disposal' to particular conduct causing a particular result."). As the Ninth Circuit explains, there are a number of textual reasons to conclude that "air emissions" are not covered by this definition. *See Ctr. for Cmty. Action & Envtl. Justice v. BNSF R. Co.*, 764 F.3d 1019, 1023-24 (9th Cir. 2014) (holding that RCRA section 1003(3) "provide[s] sufficient contextual clues for us to conclude" that "emissions of solid waste" do not fall "within [the definition's] scope").

First, as the Ninth Circuit explains, the list in the first part of the definition "does not include the act of 'emitting.' Instead, it includes only the acts of discharging, depositing, injecting, dumping, spilling, leaking, and placing." *Id.* Canons of statutory interpretation require that "when Congress expresses meaning through a list, a court may assume that what is not listed is excluded." *Id.* at 1024 (citing 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 47:23 (7th ed.2012) (*expressio unius est exclusio alterius*). Thus, there is a presumption that Congress intentionally excluded "emitting" from RCRA's definition of "disposal." Moreover, the text facially forecloses any argument that the exclusion of "emitting" was either inadvertent or stylistic. The use of the term "emitted into the air" in the second part of the definition inarguably demonstrates that the drafter was cognizant of air emissions when defining "disposal." And the use of the term "discharge into any waters" in both parts of the definition demonstrates that the drafter was willing to repeat terms when necessary.

Second, this presumption of exclusion is further supported by the fact that the definition of disposal is expressly limited to acts which "results in the placement of solid waste 'into or on any land or water.'" *Id.* at 1024. Air emissions which leave a stack or other emission point (as opposed to, say, blow-off from material piles or the use of spray chemicals[17]) and enter directly into the ambient air are not emitted "into or on any land or water." Any attempt to interpret the

[17] *See, e.g., United States v. Power Engineering Co.*, 191 F.3d 1224, 1231 (10th Cir.1999) (where Power Engineering had discharged an aerosolized hazardous mist onto the soil on its facility's site which eventually leached into groundwater and a nearby river, the court concluded that such activity constituted illegal disposing of hazardous wastes).

phrase "into or on any land or water" as somehow including air is futile since the phrase would then encompass all possible media, rendering it superfluous. *See Kungys v. United States*, 485 U.S. 759, 778, 108 S. Ct. 1537, 1550, 99 L. Ed. 2d 839 (1988) (it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").

Other RCRA provisions also confirm a presumption of exclusion. For example, RCRA's definition of the term "release"—which is found in a section of the act governing underground storage tanks—expressly includes "emitting" as among the acts constituting a release. *See* 42 U.S.C. § 6991(8) (The term 'release' means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into ground water, surface water or subsurface soils." (emphasis added)). It is a basic rule of statutory interpretation that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (internal quotation marks omitted). Here, the definition of release makes clear that Congress knew how to define "disposal" to include emissions, but nonetheless chose not to do so. *See Ctr. for Cmty. Action & Envtl. Justice v. BNSF R. Co.*, 764 F.3d at 1024-25 (9th Cir. 2014) (RCRA's definition of release in section 9001 "counsels against our reading into the definition of 'disposal' conduct that Congress must have intended to exclude from its reach").

The legislative history of the statute further confirms this reading. *Id.* at 1027. As the Ninth Circuit notes, when the CAA was amended in 1977, RCRA "included no provision regulating air emissions and, indeed, did not even contemplate the disposal of material into the air. According to its stated purpose, RCRA was limited to regulating 'land disposal.'" *Id.* at 1028 (citing H.R. Rep. No. 94-1491, at 4 (1976) (Conf. Rep.)). In 1984, RCRA was amended to include air emissions from "hazardous waste treatment, storage, and disposal facilities," representing "the first (and only) overlap between RCRA and the Clean Air Act." *Id.* (citing *Id.* (citing Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 201(n), 98 Stat. 3221, 3233); S. Rep. No. 98-284, at 63 (1983)). Based on these sources, the Ninth Circuit concludes:

> The statutory and legislative histories help to resolve any textual ambiguities in at least two ways. First, they make clear that RCRA, in light of its purpose to reduce the volume of waste that ends up in our nation's landfills, governs "land disposal." The Clean Air Act, by contrast, governs air pollutants. To that end, the histories confirm our reading of the RCRA's text.

*Id.* at 1029 (emphasis added).

In short, the emission of air pollutants is not an act that constitutes "disposal" under CERCLA. Thus, a party's intention to emit air pollution cannot be considered an intent "to dispose" of a hazardous substance under CERCLA. Because arranger liability requires such an intent, it necessarily follows that arranger liability does not provide a legal basis for EPA's expansive air deposition theory.

b) Emitting air pollutants from a facility is not "arranging" for their disposal

Even if emitting air pollution were considered disposal under CERCLA, EPA's air deposition theory would not establish arranger liability because the disposal was not performed by a second party. Consistent with the common usage of "arrange," CERCLA contrasts a party's undertaking an action directly with its arranging for it to be done by someone else. In section 107(a)(3), a party must arrange for disposal or treatment of a hazardous substance with another party for liability to attach. *See Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir.2004). This is made clear not only through the language of section 107(a)(3) (discussed directly below), but also by the broader statutory context. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."). For example, in CERCLA section 104(a), a provision delineating the President's response action authority under the act, CERCLA empowers "the President . . . to act, consistent with the national contingency plan, to remove or arrange for the removal of . . . such hazardous substance." 42 U.S.C. § 9604(a) (emphasis added). This distinction between removal and arranging for removal clearly indicates that arranging involves second parties.

The text of section 107(a)(3) also supports the conclusion that arranger liability requires the inclusion of a second party. First, the provision applies to any person "who by contract, agreement, or otherwise" arranges for disposal of a hazardous substance. While the phrase "otherwise arranged for disposal" is undeniably open-ended,[18] it must be interpreted in light of the accompanying terms "contract" and "agreement." As the U.S. Supreme Court explains, the statutory canon *ejusdem generis* requires that where "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15, 121 S. Ct. 1302, 1308-09, 149 L. Ed. 2d 234 (2001) (construing the residual clause "any other class of worker" in § 1 the Federal Arbitration Act in light of the preceding terms "seamen" and "railroad employees" (citing 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). Similarly, the canon of construction *noscitur a sociis* requires that "that statutory terms, ambiguous when considered alone, should be given related meaning when grouped together." *See, e.g., Garcia v. Vanguard Car Rental USA, Inc.*, 540 F. 3d 1242, 1247 (11th Cir. 2008). The Supreme Court explains that "by construing proximate statutory terms in light of one another, courts avoid giving "unintended breadth to the acts of Congress." *Id.* (citations and quotation omitted). In the present case, the residual phrase "or otherwise arranged for disposal or treatment" must be read to give effect to the terms "contract" and "agreement," and must itself be controlled and defined by reference to the enumerated categories of arrangements which are recited just before it. Thus, while section 107(a)(3) does not require an explicit "contract" or "agreement" to establish liability, the kind of

[18] While the Supreme Court interpreted "arranged for" broadly as "intentional steps to dispose of a hazardous substance," the case involved potential arranger liability arising through a sales transaction between Shell Oil Company and Brown & Bryant, Inc. *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. at 1879. Ultimately, Shell was not liable as an arranger in that case. *Id.* at 1880.

arrangements that are contemplated by section 107(a)(3) must be transactional in nature (i.e., akin to a contracts or agreement). *See, e.g., United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) ("We conclude that the requisite inquiry is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances."); *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989) ("While defendants characterize their relationship with [the hazardous waste disposer] as pertaining solely to formulation of a useful product, courts have not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance."). To interpret the term "otherwise arranged" apart from the terms "contract" and "agreement" is to give "unintended breadth" to CERCLA arranger liabilty.

This reading is confirmed by the "cardinal" rule of statutory interpretation that the court must give effect to all terms, phrases, and clauses in a statute, whenever possible. *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 520, 99 L. Ed. 615 (1955) ("'The cardinal principle of statutory construction is to save and not to destroy.' . . . It is our duty 'to give effect, if possible, to every clause and word of a statute . . . '"); *Garcia*, 540 F.3d at 1247 ("Another pertinent canon is the presumption against surplusage: we strive to give effect to every word and provision in a statute when possible."). Here, an expansive interpretation of "or otherwise arranged for"—one that encompassed any intentional action *with or without a second party*—would subsume the terms "contract" and "agreement" and render them totally superfluous. Under the expansive reading, contract and agreement could be dropped from 107(a)(3) without any change in meaning. This is an unacceptable construction.

A separate textual basis for requiring arrangement with a second party is the phrase "by any other party or entity." 42 U.S.C. § 9607(a)(3). When section 107(a)(3) is read closely, it is clear that the clause "by any other party or entity" modifies the words "disposal or treatment."[19] Under this construction, the provision reads: "any person who . . . arranged for disposal or treatment . . . by any other party or entity." *See Am. Cyanamid Co.*, 381 F.3d at 24 ("The clause 'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity, as was the case here."). This construction makes clear that a second party must be involved before arranger liability can attach.

[19] The first sentence of section 107(a)(3) demonstrates that the provision's drafter uses a comma before the conjunction separating the last word or phrase in a series of more than two: "who by contract, agreement, **or** otherwise arranged for . . ." 42 U.S.C. § 9607(a)(3) (emphasis added). Applying this usage throughout the section, the phrase "by any other party or entity" must stand alone, modifying "disposal or treatment." *See Am. Cyanamid Co.*, 381 F.3d at 24 ("The sentence structure of § 9607(a)(3) makes it clear" that the clause should be read "to modify the words 'disposal or treatment,' which would make the sentence read 'any person who . . . arranged for disposal or treatment... by any other party or entity.'"); *see also Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir.1992). If the alternative interpretation were true—i.e., the phrase "by any other party or entity" was the end of a series of "owners or operators"—the clause is either missing a comma and a preposition (by) or a conjunction (or). It would read either: (1) "possessed by such person, by any other party**[,]** or **[by any other]** entity," or (2) "possessed by such person, **[or]** by any other party or entity." *See Am. Cyanamid Co.*, 381 F.3d at 24.

The alternative construction holds that "by any other party or entity" modifies the preceding words "owned or possessed by such person," making it a list of owners or possessors.[20] This reading is very difficult to reconcile with a careful reading of section 107(a)(3),[21] however, and so must ultimately ground itself in appeals to CERCLA's perceived policy purposes[22] and textual flaws.[23] Moreover, the alternative reading "emasculates an entire [clause]" by rendering it superfluous. *See Menasche*, 348 U.S. at 538-39. Because all hazardous substances are necessarily "owned or possessed" by "[a] person," "any other party," or "[any other] entity," section 107(a)(3) would have the exact same meaning if the clause were simply dropped. This violates the cardinal principal of statutory construction that a statute should be read to give meaning to each word phrase, and clause. *See id.* ("'The cardinal principle of statutory construction is to save and not to destroy.' . . . It is our duty 'to give effect, if possible, to every clause and word of a statute . . . '").

In short, the clause "'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity." *Am. Cyanamid Co.*, 381 F.3d at 24 (emphasis added). Because CERCLA, in section 107(a)(3) and more generally, uses the term arrangement to indicate the involvement of second parties, EPA's expansive air deposition theory cannot establish arranger liability.

### B. EPA is Misusing CERCLA to Achieve Policy Aims Not Authorized by CERCLA

As EPA Region 4 acknowledges on its website, "Environmental justice is an integral part of Region 4's mission" and is "integrat[ed] . . . into the region's programs, policies, and procedures."[24] According to EPA, environmental justice broadly refers to ensuring that: (1) "no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, or commercial operations, or the execution of federal, state, local, and tribal programs and policies," and (2) "potentially affected community residents have an appropriate opportunity to participate in decision-making about a

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[20] *See, e.g., Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1081 (9th Cir. 2006).

[21] *See, supra*, note 19.

[22] *See, e.g., id* (overturning previous Ninth Circuit case holding that "[t]he clause 'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity," because the court was "hesita[nt] to endorse a statutory interpretation that would leave a gaping and illogical hole in the statute's coverage"); *see contra Kaiser Aluminum & Chemical Corp.*, 976 F.2d at 1341 ("Nor has [Plaintiff] alleged that [Defendant] Ferry arranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3). Ferry disposed of the soil itself by spreading it over the uncontaminated areas of the property." (emphasis added)); *and see CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188, 189 L. Ed. 2d 62 reh'g denied, 135 S. Ct. 23 (2014) ("CERCLA, it must be remembered, does not provide a complete remedial framework. The statute does not provide a general cause of action for all harm caused by toxic contaminants.").

[23] *Pakootas*, 452 F. 3d at 1080-81 ("We have previously said that 'neither a logician nor a grammarian will find comfort in the world of CERCLA, . . . a statement that applies with force to § 9607(a)(3).") (internal citations omitted)).

[24] *Region 4: Environmental Justice*, EPA.GOV, http://www.epa.gov/region4/ej/ (last visited Nov. 15, 2014).

proposed activity that will affect their environment and/or health."[25] The Alabama Attorney General supports these laudable goals and encourages EPA to always implement its policies and enforce its regulations in a fair manner that encourages "meaningful involvement of all people regardless of race, color, national origin or income." *Id.*

Even the most important policy goals, however, must be undertaken in accordance with the law. In promulgating nationally-applicable environmental statutes, Congress utilizes its unique competence and resources to strike an acceptable balance between competing interests, such as environmental protection, economic stability and job creation, respect for private property rights, and respect for individual rights. EPA, on the other hand, is tasked with the more narrow duty of implementing the environmental statutes Congress passes according to Congress's statutory mandates. As federal courts have consistently explained:

> EPA is a federal agency—a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. . . . Thus, if there is no statute conferring authority, [EPA] has none.

*Michigan v. EPA*, 268 F. 3d 1075, 1081 (D.C. Cir 2001) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)). This basic limitation on administrative agencies allows the nation to enjoy the benefits of agency expertise and regulatory oversight, while constraining agencies in their ability to impose self-created policy goals with unintended or undesirable consequences. Here, EPA fails to demonstrate that the application of its environmental justice policies comport with CERCLA.

### 1. CERCLA never references "environmental justice"

CERCLA was not designed to vindicate environmental justice policies or concerns. In EPA's own words CERCLA/Superfund "created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment."[26] More specifically, CERCLA:

- established prohibitions and requirements concerning closed and abandoned hazardous waste sites;
- provided for liability of persons responsible for releases of hazardous waste at these sites;
- established a trust fund to provide for cleanup when no responsible party could be identified; and

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[25] *Id.*

[26] CERCLA Overview, EPA.GOV, http://www.epa.gov/superfund/policy/cercla.htm (last visited Nov. 17, 2014).

- authorized two kinds of response actions: (1) short-term removals, where actions may be taken to address releases or threatened releases requiring prompt response; and (2) long-term remedial response actions, that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. These actions can be conducted only at sites listed on EPA's National Priorities List (NPL).[27]

CERCLA also enabled the revision of the National Contingency Plan ("NCP"), establishing the NPL as well as providing the guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants.[28]

Similarly, the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), which amended CERCLA, did not address environmental justice. As EPA sets forth, SARA required EPA "to revise the Hazard Ranking System (HRS) to ensure that it accurately assessed the relative degree of risk to human health and the environment posed by uncontrolled hazardous waste sites that may be placed on the National Priorities List (NPL)."[29] SARA also:

- stressed the importance of permanent remedies and innovative treatment technologies in cleaning up hazardous waste sites;
- required Superfund actions to consider the standards and requirements found in other state and federal environmental laws and regulations;
- provided new enforcement authorities and settlement tools;
- increased state involvement in every phase of the Superfund program;
- increased the focus on human health problems posed by hazardous waste sites;
- encouraged greater citizen participation in making decisions on how sites should be cleaned up; and
- increased the size of the trust fund to $8.5 billion.[30]

Tellingly, EPA's "CERCLA/SUPERFUND Orientation Manual,"[31] which was published 6 years after SARA, never mentions environmental justice. It is simply not a contemplated part of the statute.

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[27] *Id.*

[28] *Id.*

[29] SARA Overview, EPA.GOV, http://www.epa.gov/superfund/policy/sara.htm (last visited Nov. 17, 2014).

[30] *Id.*

[31] EPA OSWER, *CERCLA/SUPERFUND Orientation Manual*, EPA/542/R-92/005 (Oct. 1992).

Thus, EPA has no direct statutory basis for using CERCLA as a vehicle for pursuing its environmental justice initiative.

### 2. EPA's Environmental Justice Initiative requires EPA to modify CERCLA's evaluation criteria for setting priorities among releases

While seeking creative and innovative ways to develop impoverished or underdeveloped communities is both desirable and important, CERCLA's Superfund and NPL provisions provide EPA with no power to do so.[32] Nor does the statute authorize EPA to prioritize sites, propose sites for NPL listing, or pursue enforcement actions based on various racial, sociological, or economic distinctions between affected communities. Instead, in "determining priorities among releases or threatened releases . . . for the purpose of taking remedial action and . . . removal action," CERCLA requires EPA to consider the following:

> Criteria and priorities under this paragraph shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release, the contamination or potential contamination of the ambient air which is associated with the release or threatened release, State preparedness to assume State costs and responsibilities, and other appropriate factors;

42 U.S.C. § 9605(a)(8)(A). Because EPA is not directly authorized to pursue environmental justice goals through CERCLA, the agency must ensure that any attempts to do so are undertaken in a manner that is completely consistent with and subject to CERCLA's express statutory objectives.

It is not at all clear that EPA's Environmental Justice Initiative is compatible with section 105(a). The Initiative has a stated goal of "integrat[ing] consideration of environmental justice concerns into the . . . development of remedies in enforcement actions to benefit overburdened communities over the next three years."[33] Among its five major strategies for advancing environmental justice through advancement and enforcement actions, "Strategy 2" states that EPA intends to "advance environmental justice goals through targeting and development of

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[32] CERCLA's voluntary Brownfield program, which is not relevant to the present matter, provides EPA with some power to pursue the redevelopment of contaminated properties. Pub . L. No. 107-118, 115 Stat. 2356 (Jan. 11, 2002). That program provides EPA with funds for site rehabilitations and encourages businesses to invest in and cleanup contaminated property by providing protections from ongoing environmental liabilities associated with the contamination.

[33] EPA Off. of Enforcement and Compliance Assurance and Region 5, *Advancing Environmental Justice through Compliance and Enforcement: Implementation Plan* (Sept (2011) ("Advancing EJ Through Enforcement"), *available at*: http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-c-e-2011-09.pdf.

compliance and enforcement actions."[34] Specifically, EPA intends to "place a high priority on addressing environmental justice concerns as it develops the specific targeting and case selection strategies for . . . enforcement cases that EPA brings in FY 2011-13" by "[i]ssuing internal guidance requiring analysis and consideration of environmental justice in EPA's compliance and enforcement program."[35] This consideration is in addition to the "already . . . significant consideration" that environmental justice currently receives.[36] Further, EPA has developed a number of "screening tools to assist in identifying areas of potential environmental justice concern," using "demographic, environmental, health, and facility-level information" to assist in, among other things, "identifying areas of potential environmental justice concern that may be appropriate for enforcement action to address the effects of noncompliance on overburdened communities."[37]

Strategy 3 for advancing environmental justice through enforcement actions states that that the Office of Strategic Environmental Analysis ("OCEA") and the various EPA regions will "tailor compliance evaluation and enforcement actions as part of integrated strategies to maximize EPA's ability to gain environmental and public health benefits in overburdened communities."[38]

Strategy 4 states that EPA intends to "seek appropriate remedies in enforcement actions to benefit overburdened communities and address environmental justice concerns." *Id.* To this end, EPA regions are to "heighte[n] their focus in civil enforcement cases on potential options to obtain meaningful environmental and public health benefits to specific overburdened communities affected by violations of federal environmental laws." *Id.* EPA specifically instructs the regions to "go beyond traditional injunctive relief to stop illegal pollution, to mitigate the environmental and public health harm caused by illegal pollution and, where appropriate and agreed to by defendants, to include Supplemental Environmental Projects (SEPs) that provide benefits to communities." *Id.* at 11. In addition to the benefits that EPA regions can obtain "for overburdened communities through judicial and administrative enforcement actions," EPA regions are to look for "parallel opportunities to obtain additional benefits for the community through cooperation with . . . the business community" and to "identify specific opportunities, in cases or regional geographic initiatives, . . . to complement and leverage benefits resulting from enforcement activities." *Id.*

These tactics for pursuing environmental justice go beyond CERCLA's mandate by allowing EPA to treat certain populations as a higher priority than others when deciding whether to list a site. They also strain the limits of CERCLA's enforcement authority by encouraging regional officials to use the statute's enforcement provisions to pursue extra-statutory ends. While the Alabama Attorney General supports federal efforts to aid and revitalize suffering and impoverished Alabama communities, it is deeply concerned that EPA's environmental justice initiative impermissibly exceeds EPA's statutory authority and invites inappropriate political considerations into the NPL listing process.

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[34] Advancing EJ Through Enforcement at 5.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 6-7.
[38] *Id.* at 10.

## III. TECHNICAL ISSUES WITH THE NPL LISTING

The Attorney General's Office is also very concerned about a number of serious issues with EPA's technical bases for pursuing the NPL listing, as identified by ADEM in its recent comments to this docket.[39]

For example, the Agency for Toxic Substances and Disease Registry ("ATSDR") determined that "soil exposures in the sampled properties at the site do not present a public health hazard and that the current levels of applicable contaminants in the air are not likely to result in harmful health effects." ADEM Comments at 3. Thus, ATSDR has not issued a health advisory that recommends dissociation of individuals from the area. *Id.* Similarly, the Jefferson County Department of Health ("JCDH") has determined both that: (1) "the overall death rates for relevant cancers, asthma, and Chronic Obstructive Pulmonary Disease ("COPD") are statistically the same for the residents of North Birmingham as the rest of Jefferson County," and (2) "the rates for infant mortality, stillbirths, and the occurrence of birth defects were statistically the same for the residents of North Birmingham as the rest of Jefferson County." *Id.* Thus, neither ATSDR nor JDHC findings support the conclusion that there is an imminent risk to the health of the general population in the North Birmingham area. This stands in contrast to the Michigan and Indiana release sites included in EPA's proposal. In fact, there is an impacted public water supply associated with the Indiana site.

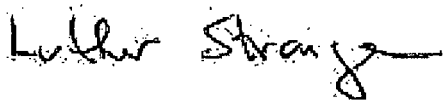
Because these technical issues, and others, undermine EPA's bases for proposing the 35th Avenue site for NPL listing, the Attorney General's Office hereby incorporates ADEM's comments and joins ADEM in its objections.

## II. CONCLUSION

The State of Alabama continues to oppose EPA's proposal to include the 35 Avenue site on the NPL. The listing is premature because of EPA Region 4's failure to adequately involve the State in its decision making process concerning the site and its failure to institute its conflict-resolution process as set forth in the Fields Memorandum. Furthermore, EPA's expansive air deposition theory is legally flawed because it ignores CERCLA's "federally permitted" release exemption and incorrectly applies section 107(a)(3) arranger liability. The State is also concerned that EPA may have improperly injected political priorities into the NPL listing process through its environmental justice initiative. Finally, the State concurs with ADEM regarding various technical deficiencies in EPA's HRS scoring for the site. For all of these reasons, the State of Alabama urges EPA to withdraw its proposal and work with the State to determine a more suitable plan for the site.

[39] Letter from Lance R. LeFleur, Dir. of ADEM, to Docket Coordinator, EPA Headquarters (Jan. 13, 2015) (ADEM Comments).

Respectfully,



Luther Strange
Attorney General

cc: Governor Robert Bentley
Administrator Gina McCarthy
Ms. Gwendolyn Keyes Fleming
Mr. Lance R. LeFleur
Mayor William A. Bell, Sr.